IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27119-6-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
VICTOR J. STEVENSON,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Victor Stevenson appeals the Douglas County Superior Court's refusal to allow him to withdraw his guilty plea. There has been no manifest necessity shown for withdrawing his plea. We thus affirm.

FACTS

Mr. Stevenson was convicted in Grant County Superior Court of several felonies committed in 2006 and sentenced on April 23, 2007 to 50 months in prison. He was then transferred to Douglas County. There, on October 8, 2007, he pleaded guilty to amended charges of one count of second degree unlawful possession of a firearm and two counts of third degree assault.[1] The charges arose from his discharge of a gun at a mall in East

Wenatchee one year earlier. The plea statement form drafted by his counsel recognized that the standard range for the offenses would be 43-57 months. The written agreement indicated that the parties would recommend a sentence of 43 months, with credit for time served since the transfer from Grant County. The written form did not indicate whether the Douglas County sentence would be concurrent or consecutive to the Grant County sentence. The trial court did advise Mr. Stevenson that regardless of the plea agreement, the court was able to impose the maximum sentence.

Sentencing was conducted two weeks later. The prosecutor urged the court to follow the plea agreement and noted that it called for the 43-month sentence to be served consecutively to the Grant County charges. Defense counsel concurred in the consecutive sentence recommendation. Mr. Stevenson did not challenge those recommendations. The trial court followed the plea agreement and imposed a 43-month sentence to be served consecutively to the Grant County sentences.

One month later Mr. Stevenson, acting *pro se* from prison, filed a motion to withdraw the guilty plea, stating that he believed the plea agreement called for concurrent sentences. A hearing was held with counsel for both sides. The trial court responded by entering an order clarifying that credit was to be given for time served from Mr.

[1] The original charges included first degree burglary, second degree assault, possession of a stolen firearm, and first degree unlawful possession of a firearm.

Stevenson's transfer from the Grant County jail. On February 28, 2008, Mr. Stevenson filed another motion to withdraw his guilty plea. He claimed that double jeopardy precluded the unlawful firearm possession charge and that he received ineffective assistance of counsel because he believed the sentence recommendation was for concurrent, not consecutive, prison time.

The court conducted an evidentiary hearing; new counsel was appointed to represent Mr. Stevenson. Mr. Stevenson explained that he believed the plea agreement called for concurrent sentencing. He withdrew his double jeopardy challenge to the unlawful firearm possession charge. The court then heard testimony from Mr. Stevenson's original attorney, who testified that he had told Mr. Stevenson that the agreement required consecutive sentencing.

The trial court found that Mr. Stevenson had known before the plea hearing that the agreement called for consecutive sentencing. Written findings and an order denying the motion for a new trial were entered. Mr. Stevenson then appealed to this court.

ANALYSIS

This appeal presents two issues, only one of which we have authority to resolve.[2] Mr. Stevenson argues that the court erred in sentencing him to consecutive sentences. He did not timely appeal the judgment he now seeks to challenge. His timely challenge to the court's motion to withdraw the guilty plea is without merit. We address the two issues in that order.

Consecutive Sentences. Mr. Stevenson first argues that the court erred in imposing consecutive sentences. He did not appeal, however, from the judgment and sentence entered October 22, 2007. He had 30 days to do so. RAP 5.2(a). Instead, he appealed on May 15, 2008, from the order denying the second motion[3] to withdraw the guilty plea. While the appeal from that latter motion was timely, an appeal from a post-trial motion does not bring up the underlying judgment. *State v. Gault*, 111 Wn. App. 875, 46 P.3d 832 (2002). Thus, the attempt to appeal the consecutive sentence issue is untimely.

The issue is also without merit. RCW 9.94A.589(3) expressly states that a trial

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[2] Our Commissioner denied a motion on the merits, noting that there might be an argument that the prosecutor had undercut the plea agreement. The parties did not seek to brief that issue and have presented no argument on the topic, so we are not in a position to address it. However, the argument is contrary to the trial court's unchallenged finding that the plea agreement called for consecutive sentences.

[3] While a prisoner is normally limited to one collateral attack, RCW 10.73.090 *et seq.*, we consider the second motion to withdraw a guilty plea to be a renewal of the first motion because the court did not consider the merits of the claim when it clarified the credit for time served. Thus, review of the motion is not barred. RCW 10.73.140.

judge has discretion to impose a consecutive sentence when entering a judgment and sentence after another judgment was previously entered. When the judge fails to expressly state the order of sentences, they run concurrently. *Id.* Other provisions govern different circumstances. With a few exceptions for certain serious crimes, all sentences imposed on the same day will be served concurrently.[4] RCW 9.94A.589(1). When an offender is already under sentence for commission of a felony at the time a new offense is committed, a circumstance not presented here, judges are required to impose consecutive sentences. RCW 9.94A.589(2). Neither of these two subsections is applicable to this case.

RCW 9.94A.589(3) was the only provision that governed this situation because the Grant County and Douglas County crimes were not sentenced on the same day. The trial court had authority to impose consecutive sentences. The court exercised that authority. There was no error.

Ineffective Assistance of Counsel. The primary issue presented here is Mr. Stevenson's contention that his counsel provided ineffective assistance by not ensuring he understood the terms of the plea agreement. This argument fails in light of the trial

[4] One exception is for conviction of possession of a stolen firearm and unlawful possession of a stolen firearm. In that circumstance, RCW 9.94A.589(1)(c) requires the offenses to be served consecutively. This provision would have applied if Mr. Stevenson had been convicted on the original charges filed in Douglas County.

court's factual finding that he had been advised.

Effectiveness of counsel is judged by the two prong standard of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness; and (2) actual prejudice resulted from counsel's failures. *Id.*

Effective assistance in the plea bargain context is judged by whether the attorney "actually and substantially assisted his client in deciding whether to plead guilty." *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901, *review denied*, 96 Wn.2d 1023 (1981). Failure to assist would amount to a violation of the first prong of *Strickland*. *In re Pers. Restraint of Peters*, 50 Wn. App. 702, 703-704, 750 P.2d 643 (1988).

If a defendant was able to show that defense counsel's behavior was defective, he would still have to show resulting prejudice. In the context of a guilty plea, this means that the defendant must show he would not have entered the guilty plea but for his counsel's ineffectiveness. *Id.* at 708.

The law governing guilty plea challenges is also well settled. CrR 4.2(f) permits a guilty plea to be withdrawn whenever "necessary to correct a manifest injustice." The appropriate standard for applying this rule was set out in *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974), as follows:

Under CrR 4.2(f), adopted by this court, the trial court shall allow a defendant to

withdraw his plea of guilty whenever it appears that withdrawal is (1) *necessary* to correct a (2) *manifest injustice, i.e.*, an injustice that is obvious, directly observable, overt, not obscure. *Webster's Third New International Dictionary* (1966). Without question, this imposes upon the defendant a demanding standard.

The written statement form itself is sufficient to establish that the plea was voluntary. *State v. Lujan*, 38 Wn. App. 735, 688 P.2d 548 (1984), *review denied*, 103 Wn.2d 1014 (1985).

Mr. Stevenson raises three related challenges to his attorney's effectiveness. First, he contends that counsel did not tell him that the agreement called for consecutive sentences. Second, he argues that he and his counsel did not ratify the plea agreement because the consecutive sentence requirement was not put on the record until the sentencing hearing. Finally, he contends that he did not understand all of the direct consequences of the guilty plea because he did not understand that he would receive consecutive sentences. The record contradicts his arguments.

The trial court's factual finding was that original counsel, Mr. Brandt, discussed the plea agreement at the jail and Mr. Stevenson accepted the agreement. He also never expressed any confusion on this point when the issue was pointed out to the trial court. Clerk's Papers at 59. The testimony of Mr. Brandt at the hearing on the motion for a new trial supported the finding. Report of Proceedings at 35-36. Accordingly, it is a verity in this court. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Mr. Stevenson knew that his agreement called for the parties to recommend consecutive sentences.

The second alleged failure of counsel is to ratify the plea agreement. This was done, as appellant concedes, at the sentencing hearing when the defense concurred with the prosecutor's recitation of the entire bargain to the court. While ideally the entire agreement should have been fully explained to the court at the time of the guilty plea, we do not believe that the parties can put forward incomplete information and then complain there was error. We also do not see how defendant was harmed by the timing of his ratification of the plea agreement.

Finally, Mr. Stevenson vaguely argues that he was not aware of all of the direct consequences of pleading guilty because he did not understand that the sentences would run consecutively. There are two problems with this argument. First, this argument also is contrary to the court's factual finding that the plea agreement called on the parties to seek consecutive sentences. Therefore, Mr. Stevenson did know that consecutive sentences might result. He also was told at the plea hearing that the court could sentence him to the maximum because it was not bound by the agreement. He was aware that he might serve a longer sentence than expected. The second problem with the argument is that Mr. Stevenson presents no authority that suggests the possibility of a sentence being ordered served consecutively to an earlier sentence is a direct consequence of pleading guilty. Our own research has not uncovered any published Washington authority

requiring advice of the possibility of consecutive sentencing at the time of a guilty plea.[5] We would note, however, that the Ninth Circuit has ruled that the possibility of consecutive sentences is *not* a direct consequence of pleading guilty. *United States v. Wills*, 881 F.2d 823 (9th Cir. 1989). In the absence of full briefing from both parties on this topic, we will not attempt to decide if Washington law requires the trial court to advise a defendant about the possible ordering of sentences with other cases.

Mr. Stevenson has thus failed to show that his counsel erred. He also has failed to show that he was prejudiced by his counsel's actions. We note that counsel negotiated a substantial bargain for him. The prosecutor agreed to reduce the original charges from one class A and three class B felonies to three class C felonies. That significant reduction in the charges resulted in a much lower sentence range. The plea agreement then required the parties to recommend 43 months in prison, which was the lowest possible sentence. An additional 43 months was a significant reduction in Mr. Stevenson's prison time exposure. If there had not been a reduction in charges, the prosecutor could easily have added firearm enhancement charges to the burglary and assault counts, triggering many additional years of punishment. Under the circumstances, we agree with the trial court

[5] The failure of the parties to advise the court of the Grant County sentence shows that imposing such a requirement might be problematic, since the judge hearing the guilty plea typically would not know about other sentences unless advised by the parties. The problem would be compounded by sentences imposed by other courts after a guilty plea but before a sentencing, something that is not uncommon.

that the prosecutor would not likely have agreed to a sentence, as suggested by Mr. Stevenson, that essentially gave Mr. Stevenson no additional jail time in addition to reducing the more serious charges to three class C felonies.

Mr. Stevenson has not established that his counsel performed ineffectively. His counsel may have erred by not more fully specifying the plea agreement when he prepared the plea statement form. The prosecutor also should have caught that oversight and called it to the trial court's attention at the time of the plea. Nonetheless, this error, if it is one, does not arise to the level of showing that counsel failed to the extent required to show ineffective assistance.

The trial court's order denying the motion to withdraw the guilty plea is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J. Brown, J.